Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DOWNEY,
Petitioner,

– against –

MICHAEL MOORE,
Secretary, Department of Corrections, State of Florida
Respondent,

and

The Attorney General of the State of Florida
Additional Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

ISSUE I

Whether certiorari must be granted because Mr. Downey's federal constitutional right to Due Process was violated when the prosecution's principal expert (a) vouched for the veracity of the accusations and (b) claimed that scientific analysis indicates the occurrence of the crime, and thus Mr. Downey's guilt.

ISSUE II

Whether certiorari must be granted because Mr. Downey's federal constitutional right to Confrontation was violated when the trial court prevented face-to-face confrontation between the complainant and Mr. Downey.

ISSUE III

Whether certiorari must be granted because procedural rules do not bar review of Mr. Downey's petition for habeas corpus.

THE PARTIES

The caption in this case contains the names of all of the parties.

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OPINION BELOW

The circuit court decisions denying a certificate of appealability from which Petitioner seeks discretionary review is not in the official reporters. They are appended at A1 and A2. The district court decisions are appended at A5, A7, and A9. Decisions of the district court of appeal of Florida are reported at 652 So. 2d 824 (1995) and 718 So. 2d 181 (1998).

JURISDICTION

On July 6, 2000, the United States Court of Appeals denied Mr. Downey's motion for a certificate of appealability. Mr. Downey timely filed a motion for reconsideration which was denied on September 15, 2000.

This petition is timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution, provides:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

Amendment VI, United States Constitution, provides:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....

Amendment XIV, United States Constitution, provides:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

Gerald Downey – currently serving two life-sentences – is an innocent man. Nevertheless, in a Florida state court in 1993, he was convicted of capital sexual battery and lewd and lascivious activity with his son Billy who lived with his mother, Virginia Beebe. Mr. Downey pled not guilty and testified at trial, denying all accusations and charges against him. He continues to assert his innocence.

The case against Mr. Downey was manufactured. Billy's mother – Mr. Downey's former girlfriend – his great aunt and maternal grandmother, as well as police, Human Resource Services (HRS) workers, and the prosecutor all subjected him to massive amounts of influence to accuse his father of abuse.

The acts of abuse allegedly occurred three to four years prior to trial when Billy was between three-and-a-half and four-and-a-half years old. Billy's testimony was equivocal at best. Other state witnesses polluted the trial with unreliable hearsay, repeating accusations they extracted from Billy in the years before trial. The state also presented a medical expert who was unable to provide physical evidence of abuse.

The state's most powerful witness was psychologist Joseph Crum who told the jury, *inter alia*, that the accusations against were true and that Billy had indeed been molested. This type of vouching testimony has been recognized as unconstitutional by the circuit courts that have considered the issue. Thus, the Eleventh Circuit's refusal to consider this case and grant the writ of habeas corpus represents a departure from the settled constitutional standard.

Federal court review is particularly important in this case in which the subject matter -- child abuse -- often inspires community passions that state courts cannot bear. Thus, the

need for a dispassionate review by the federal judiciary is crucial to the administration of justice. The lower federal courts in this case abdicated responsibility, denying Mr. Downey's petition for habeas relief without even considering its merits. Neither lower court even requested that the state file an answer, opting instead to summarily deny relief.

Circuit court judge Dubina denied Mr. Downey's petition for a certificate of appealability, stating only that Mr. Downey had failed to "make a substantial showing of the denial of a constitutional right." In fact, Mr. Downey showed that his federal constitutional right to due process was violated, and alerted the circuit court that it had very recently reversed the district court and issued a writ of habeas corpus in a nearly identical case, *Snowden v. Singletary*, 135 F.3d 732, *cert. den'd* 119 S.Ct. S.Ct. 405 (1998).

This Court denied Florida's request for a certificate of appealability in *Snowden*. Thus, the constitutional error on which the writ of habeas corpus was based in that case is sufficient to require that the writ issue here.

Relevant Facts

Mr. Downey was a Greyhound bus driver in Boston. In 1978, he moved to Florida to be near his parents. He is 60 years-old. Before this case he had no criminal record.

Mr. Downey met Ms. Beebe – a licenced nurse – in 1983. (Tr. 174, 434) They dated for about a month and then began living together in Mr. Downey's home. (Tr. 435)

After about a year and a half, Ms. Beebe became pregnant and wanted to marry. (Tr. 175, 436) Mr. Downey wanted to continue living with Ms. Beebe, but felt that marriage would not work because of the difference in their ages and because

their relationship was not "that solid." (Tr. 436) "A little angry," Ms. Beebe left Mr. Downey. (Tr. 175, 437)

When Billy was two and-a-half, Mr. Downey wanted to spend time with him. (Tr. 180, 441) He explained, "I wanted to see him and have an association with him.... I thought I had something to offer him." (Tr. 445)

For nearly a year, Ms. Beebe accompanied Mr. Downey and Billy during the weekly visits. Billy enjoyed the visits and there were "absolutely no problems." (Tr. 180, 220-221)

When Billy was about three-and-a-half Ms. Beebe stopped accompanying them. The visits became more frequent and eventually Mr. Downey watched Billy while Ms. Beebe was at work. There was no indication during this time that anything improper occurred during the visits. (Tr. 187)

Ms. Beebe testified that when Billy was about four years old, he began exhibiting behavior problems and began "having accidents in his pants....bowel movements," which his doctor diagnosed as a diet problem. Billy was placed in a program for emotionally disturbed children. (Tr. 183-184, 202)

Ms. Beebe conceded that Billy's behavior problems began when she changed jobs and work schedules and that this might have had some bearing on his behavior."[1] (Tr. 183)

While Billy had these behavior problems, Ms. Beebe – a

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[1]During the year of unsupervised visits, Billy's behavior problems diminished. Ms. Beebe found his progress remarkable. (Tr. 210) School reports from that time indicate "significant strides." (Tr. 312) It was not until after claims of molestation were extracted that his problems began. (Tr. 211)

nurse – cleaned and bathed him daily. She never noticed anything wrong with his rectum or anus. (Tr. 202-203) At no time did Billy indicate in any way that he experienced problems with any part of his body. (Tr. 204)

On May 26, 1991, after years of successful visits, Mr. Downey and Billy had "a bad visit." Mr. Downey testified:

> It was a bad visit that we had all day long....He was carrying things around the house.....(Tr. 446) He was dragging things around the house. He went out into the garage and brought in my bug spray can...and started spraying that around the house... And he sat in my car for a while, and he was beeping the horn because he was playing school bus driver....This was the worst day. (Tr. 460)....He broke my vacuum cleaner. He broke a few things. I have fruit trees in the back yard and he took that long pole with the fruit picker on the end of it...and he stuck a hole in the screen porch. (Tr. 461)

Losing his patience on that "worst day," Mr. Downey "slapped him on the head." "I gave him a pretty good crack and it made him upset," Mr. Downey testified. (Tr. 445)

That day, Ms. Beebe came home from work and called Mr. Downey to tell him to bring Billy home. (Tr. 222) Mr. Downey told Billy "he had been a bad boy all day and that it was almost time for him to go home." We would usually stop at McDonald's.... I didn't stop because he was so bad." (Tr. 447) Before he left Billy at home, Billy "said that he was very upset and that I didn't love him anymore." (Tr. 446)

Ms. Beebe testified that Billy "was very upset" that night, and said his father didn't love him anymore. She was surprised by that comment but didn't ask him about it. (Tr. 188,224) She bathed him that night and noticed nothing wrong or unusual

with any part of his body. (Tr. 225)

That evening, Ms. Beebe called Mr. Downey and told him she wanted to return to supervised visits. (Tr. 189) According to Ms. Beebe, Mr. Downey said that Billy had gotten into trouble that day. (Tr. 189) Mr. Downey, providing more detail of that conversation, testified

> She asked me what had happened during the day and why Billy was so upset and crying and saying that I didn't love him anymore. And I said that he had misbehaved. He was breaking things in the house and made a pest of himself and I just lost my temper with him...I think she said something like, we should start the three-way visits again, and I believe the visits were moved to Saturday." (Tr. 448)

The next day, Billy wanted to see his father. (Tr. 226)

According to Ms. Beebe, the day after the "bad visit", Billy was playing with his cat, touching its "anal area." She told him not to do that, to which he said: "Daddy touches me there all the time." (Tr. 190) Ms. Beebe became upset and "decided that after I calmed down to take him over to my aunt's house so he could talk with her." (Tr. 190) Her aunt couldn't make him talk about inappropriate touching. (Tr. 191)

At Billy's insistence, his visits with Mr. Downey continued, although Ms. Beebe accompanied him. (Tr. 191)

Some six weeks after the "bad visit," Ms. Beebe's mother, Mrs. McCloud persuaded Billy to say that his father: "*tried* to put his penis in Billy's mouth (Tr. 197); "put his pretend snake in [Billy's] mouth, and...touched him a lot" (Tr. 230); and anally raped him. (Tr. 236) She also elicited a story about molestation in a public bathroom at a grocery store that was witnessed by a store employee (Tr. 232) and in a public park.

(Tr. 236) No witnesses were presented at trial.

Neither Ms. Beebe nor Mrs. McCloud contacted police. Instead, Ms. Beebe mentioned to a friend the claims Billy's grandmother elicited. The friend contacted HRS. (Tr. 230-231)

The Investigation

On July 10, 1991, HRS worker Pitt and police officer Stempinski each conducted an interview of Billy. (Tr. 231) Officer Stempinski found Billy "difficult to interview." (A13)

On July 15, 1991, Billy's mother and grandmother took him to be interviewed by Detective Benitez-Kleiman. (Tr. 327) By the time of that interview, Billy had become very compliant and Benitez-Kleiman easily elicited accusations and even demonstrations from Billy. (Tr. 328-339)

Benitez-Kleiman testified that prior to interviewing Billy she was told of the stories of abuse elicited by his mother, great aunt, grandmother and of officer Stempinski's opinion: "that something occurred surrounding the child's penis being touched by his father...." (Tr. 345, 348, 357; A 7) It was only then, having learned of all these conclusions and accusations, that the detective questioned Billy and elicited accusations.

Benitez-Kleiman testified that Billy's allegations were not influenced by any of the adults who questioned him. (Tr. 333)[2]

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[2]Her conclusions are wrong. The literature concerning effects of suggestion on a child's reports shows that children subjected to suggestive questioning adopt suggestions as fact – even when they involve events never experienced. Also, the research shows that once subjected to suggestive questions, children's false reports are indistinguishable from accurate

She also said that her own questions were not leading or suggestive.[3] (Tr. 335)

According to Benitez-Kleiman, Billy said:

> that his dad kisses on his privates, and I asked him to tell me a little more about that, how he kisses him. And he said that he pulls his pants down and kisses and sucks on his private parts.....He also told me that his dad plays with him and makes him get on his back. I asked him what he meant by that. He got off the chair and put his hands behind his back, he laid down and put his legs straight up in the air. And he told me that is what his dad makes him do. He puts his finger in his butt hole. (Tr. 334-335)

She also elicited a claim that his father "was mean and likes to blow up cars," that his father would put bug spray in a car and make it blow up and that "his daddy doesn't love him." She claimed that when she asked Billy why he felt that way, he said "because he squeezed my front privacy." (Tr.332)

The detective scheduled a medical examination for the same day. (Tr. 195)

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ones. Ceci & Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis,* Psychological Bulletin, 113, 403-439 (1993); Bruck, Ceci, Francouer & Barr, *I Hardly Cried When I Got My Shot!": Influencing Children's Reports.* Child Development, 66, 193-208 (1995); Leichtman & Ceci, *The Effect of Stereotypes and Suggestions on Preschoolers' Reports.* Developmental Psychology, 31, 568-578 (1995).

[3]Because she did not record her interview, there is no way of supporting her claims in this regard.

Medical Examination

Dr. Smith provides "medical examinations for the [state 'child protection'] team." She testified the children HRS refers to her "[are] victim[s] of child abuse...." (Tr. 373) After being told that he reported abuse by his father, including penetration of his anus, Smith examined Billy. (Tr. 380,381, 388)

Dr. Smith found that Billy's penis appeared normal and gonorrhea cultures were negative. (Tr. 379) She also found:

> [T]he rectal area and the buttocks were normal. The skin around the anus had a small amount of stool on it, but otherwise appeared normal. The folds around the anus appeared to be more smooth than normally I have seen. It was all the way around. And there was a small area near the top, that would be upward from the genital area, that was red and a little bit irritated....The muscle tone of the anus appeared to be normal. (Tr. 375, 379)

Dr. Smith was aware that Billy experienced problems with constipation during the year prior to her examination and that he had "a problem with not wiping himself well." She agreed that constipation can cause the smoothness she described and that the irritation can be caused by chronic irritation of the skin. She added, however, that the smoothness around the anal area could be the result of penetration.[4] (Tr. 376, 377, 383)

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[4]By the time of Smith's examination, Billy had not been with Mr. Downey for some six weeks. Smith said the normal muscle tone around Billy's anus could be consistent with penetration because any injury would have healed. The same logic holds that redness, irritation or smoothness of his anus were the result of something other than alleged penetration by Mr. Downey. After all, any injury would have healed. Thus,

Following questioning by his mother, great aunt, and grandmother, HRS workers and police, and the invasive genital and anal examination, Billy was put in counseling where remained through trial. (Tr. 196, 237-238, 240) In preparation for trial, Billy was also questioned by state psychologists Joseph Crum and Gail Azar and the prosecutor.

The Trial

The state's case was comprised of testimony from Billy, his mother, detective Benitez-Kleiman, and "expert" witnesses, psychologist Crum and physician Smith.

Billy was permitted to testify without facing Mr. Downey. He said that on numerous occasions the adults named above talked with him about allegations they had elicited. (Tr. 135, 155) The prosecutor also talked to him about what he was to say in court as recently as that morning. (Tr.143-144)

Billy's testimony was tentative, full of contradiction, and generally limited to the words "penis and butt" in response to prosecutor questions. (Tr. 121 -158) It is noteworthy for his one-word assents to prosecutor questions and his inability to remember anything about his father other than stories of abuse elicited from him by family members, investigators, experts and therapists during the years prior to trial. In fact, Billy said that all he could remember of his father was: "I think we just probably watched T.V." "I just can't remember the rest. I just know that he took me to the park." (Tr. 126, 128)

Billy could not remember any details of abuse. He didn't know whether he had ever seen his father's penis. (Tr. 132) He

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the condition of Billy's anus could not have been caused by Mr. Downey. (Tr. 375-376, 379)

couldn't remember what room he and his father were in when his father allegedly touched him. (Tr. 131, 133)

Asked whether Mr. Downey did anything other than put Billy's penis in his mouth, Billy answered, "yes." When asked what else Mr. Downey did, he said:

> I messed up. No. I think – I don't – I'm a little nervous. I just don't remember. It's hard for me to make up my mind. Years have passed and I don't remember all of the stuff. (Tr. 132)

Billy said he was "very scared" of his father and afraid of his father being mean to him. He couldn't remember, however, when or how his father had ever been mean to him. (Tr. 154)

Billy's grandmother had elicited a claim that his father molested him in a grocery store and in a public park. At trial, he said he never told his grandmother either of these things. (Tr. 146, 148) He said he never told his mother he didn't want to see his father again or that he hated his father. (Tr. 151)

Summing up his own testimony Billy said, it is "hard to make up my mind" about what happened because the last time he had seen his father was "so long ago." (Tr. 158)

Billy's mother, Ms. Beebe, was not a witness to any alleged abuse, thus, she served only to introduce the out of court statements she extracted from Billy.

Detective Benitez-Kleiman vouched for Billy's veracity, claiming his accusations were not the product of suggestion or influence. (Tr. 333) She also repeated out of court statements she elicited from Billy. (Tr. 332-354)

The detective testified that she assumed Billy's claim that

his father urinated on the carpet was a report of ejaculation. She conceded that the police found no evidence of any bodily fluid on any carpet in Mr. Downey's home. (Tr. 350-353)

The state used Dr. Crum to validate Billy's accusations. He told the jury, *inter alia,* that Billy's accusations were true and that Billy exhibited the characteristics of an abused child.

The Prosecutor's Summation

The prosecutor hammered hard on Dr. Crum's testimony, reminding the jury that the doctor's expert opinion was that the accusations against Mr. Downey were true.

Jury Deliberations

The jury requested a read-back of testimony from Billy and the detective. The court denied the request. (Tr. 523)

The jury wanted to know if Billy described oral copulation or merely answered "yes" or "no" to a question by the prosecutor. The jury asked the same question about the claim of penetration. The court denied the requests.[5] (Tr. 525-527)

Conviction and Sentence

Shortly after the jury's requests were denied, a verdict of guilty was reached on three counts. (Tr. 530) Mr. Downey was immediately sentenced to two life sentences and one sentence of 18 months. (Tr. 532-533)

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[5]Thus, the jury revealed its concern that the accusations were the product of suggestion and the trial court left the jury with only Dr. Crum's unconstitutional vouching claims.

After his direct appeal and state post conviction relief petition were denied, Mr. Downey sought federal habeas relief on May 27, 1999, within a year of the denial of his motion for rehearing in state court. His petition was 52 pages in length and accompanied by a substantial appendix. On June 8, 1999 – just over a week after filing – the district court denied the petition without a hearing. A motion to alter and amend filed on June 23, 1999 was denied on March 17, 2000. Mr. Downey filed a timely notice of appeal in the district court on April 13, 2000. The district court denied a certificate of appealability.

On May 8, 2000, Mr. Downey filed a motion for a certificate of appealability in the Eleventh Circuit. That motion was denied on July 6, 2000 (Dubina). A motion for reconsideration by a panel or the Court was denied on September 15, 2000 (Tjoflat, C.J. and Black, J.).

REASONS FOR GRANTING CERTIORARI –

ISSUE I

CERTIORARI MUST BE GRANTED BECAUSE MR. DOWNEY'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE PROSECUTION'S PRINCIPAL EXPERT VOUCHED FOR THE VERACITY OF THE ACCUSATIONS.

Dr. Crum's testimony violated the constitutional proscriptions on vouching testimony and violated Mr. Downey's right to Due Process.

A. Testimony Vouching For a Complainant's Veracity Violates Due Process

Several circuit courts hold that expert vouching for the veracity of a witness violates due process rights.

In *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998) – a molestation case similar to this one – the Eleventh Circuit reversed the district court's denial of a petition for a Writ of Habeas Corpus because a prosecution expert offered an opinion on the veracity of children. The circuit court wrote: "that such testimony is improper, in both state and federal trials, can hardly be disputed."

In *United States v. Provist*, 875 F.2d 172, 176 (8th Cir. 1989) the Eighth Circuit condemned an expert's "isolated statements" which implied her belief in the allegation. And in *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986), the circuit court reversed a sexual abuse conviction because an expert testified that he could "see no reason why [the child] would not be telling the truth in this matter." *Azure*, 801 F.2d at 339. The circuit court held that by "putting an impressively qualified expert's stamp of truthfulness" on the accusation, the comment "invaded the exclusive province of the jury to determine the credibility of witnesses."

The Ninth Circuit in *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985), a sexual abuse case, condemned an expert's claim that "the complaining witnesses were able to distinguish reality from fantasy and truth from falsehoods."*Id*, at 602.

And, in *U.S. v. Scop*, 846 F.2d 135, *reh'g granted on other grounds*, 856 F.2d 5 (2d Cir. 1988), the Second Circuit held, "expert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness' testimony." *Id*, 846 F.2d at 142.

Accordingly, the circuit courts that have considered this issue have recognized that the Constitution will not tolerate the use of vouching testimony as a means to a conviction.

The Eleventh Circuit, it's decision in *Snowden* notwithstanding, has departed from this rule in this case. Thus, certiorari should be granted by this Court.

B. Dr. Crum Vouched For Billy's Veracity

1. Dr. Crum Vouched for the Accusations in this Case.

Defense counsel objected to the legal admissibility of Dr. Crum's testimony, warning that he would vouch for Billy's accusations. (Tr. 245-279)

The prosecutor told the court that Dr. Crum twice examined Billy and would testify about the profile "of the type of behaviors kids exhibit as abused children" and that Billy's behavior is inconsistent with having been subjected to suggestive questioning.[6] (Tr. 246) Thus, the prosecutor conceded, Dr. Crum would vouch for the accusations.

Noting: "It is my firm belief that Dr. Crum thinks that everybody the State Attorney sends to him has been sexually abused....", the trial court ruled that Dr. Crum would not be permitted "to testify as to whether or not in his opinion someone has been sexually abused." (Tr. 248) But, the court permitted him to testify "that [Billy] fits the criteria of a sexually abused child...", about "the characteristics of an abused child, and any such characteristics in this case..." (Tr. 249,300). In fact, Dr. Crum vouched for the accusations.

2. Dr. Crum Claimed Expertise in Differentiating True From False Claims of Abuse.

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[6]The scientific research literature soundly rejects these claims. *See* note 2, *supra.*

Dr. Crum claimed expertise in distinguishing true from false accusations, telling the jury he was "compiling a statistical study with regard to true and false sexual abuse allegations." (Tr. 282) Thus, he assured the jury that he is an expert in determining the truth of a child's claim of abuse.

Bolstering his own opinions, Dr. Crum told the jury that his conclusions were based on a scientific protocol. He claimed that his examination of a child includes an assessment "of the child's capacity to understand the concept of telling the truth versus telling a lie ...[and] a personal evaluation as to what the child's incentive is, and the child's fantasies, and these kinds of things." (Tr. 283) Dr. Crum told the jury, he uses complex psychological tests. He testified, in part:

> I'm looking, obviously, at the content of the interview.... I also observe the feelings aspect of the emotional aspects of whatever it is that they're feeling. So with those two factors I also combine with the information that has been provided. (Tr. 297-299)

Based on this, Dr. Crum testified, his examination of Billy revealed no "evidence of contamination [or] suggestibility...." (Tr. 323) In other words, he told the jury, they are true.[7]

Further, Dr. Crum's very presence in court on behalf of the state, is a statement to the jury that he believed the accusations were true. After all, had he not believed in Mr. Downey's guilt, he wouldn't have testified in support of them.

Dr. Crum also vouched for the accusations by telling the jury that there are certain behaviors that are indicative of abuse

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[7]Note that Dr. Crum's claims are of his own invention. There are no such protocols or diagnostic methods. He offered nothing in support of his claims.

and that Billy exhibited these behaviors. (Tr. 299)

He added that in addition to the behaviors reported by his mother, Billy exhibited symptoms of sexual abuse that were not observable to a lay person, but which he -- as an expert -- could recognize.[8] He testified:

> [T]he anxiety that I am talking about is not necessarily observable anxiety....And I felt that in part was a way that he managed his stress..... the fact that the child does not really, you know, look upset, or demonstrate behavioral problems certainly doesn't mean that there is not a disturbance... (Tr. 315)

Dr. Crum claimed that he based his finding on – in addition to behaviors reported by Ms. Beebe – "many more behaviors... that [Billy] displayed." (Tr. 321)

Further, Dr. Crum conceded that a school report written in May 1991 – the month of Billy's alleged disclosure – stated that Billy had made significant improvement with regard to his behavior. However, he then characterized that report as a comment only on Billy's "observable behavior." Thus, again he told the jury that there are behaviors that only he could see, and that these were in fact indicative of abuse.[9] (Tr. 313)

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[8]Dr. Crum offered no scientific basis for his claim. Indeed, there is none.

[9]In another unbelievably bizarre and twisted piece of testimony, Dr. Crum told the jury that the "child sexual abuse accommodation syndrome" is an indicator of abuse. He then said, "[the]...syndrome is not a syndrome and it is a way of understanding how children disclose alleged abuse." (Tr. 290)

He also told the jury that although Billy's behaviors could have been related to any stressor in his life, it was his "expert" conclusion that they were characteristic of abuse. Thus, he concluded that the accusations elicited from Billy are true.[10] (Tr. 301-303, 309, 317)

Although the accusations were extracted from Billy by his mother, great aunt, grandmother, and police, Dr. Crum said he detected "some indications of the child sexual abuse [sic] from the way that [Billy] disclosed the allegations." (Tr. 322)

Finally, Dr. Crum said that Billy exhibited the symptoms or behaviors of an abused child. (Tr. 302)

In sum, Dr. Crum told the jury in any number of ways that the accusations were true and accurate and that Mr. Downey was guilty. This testimony violated the constitutional prohibition on vouching.

C. The Prosecutor Stressed Dr. Crum's Improper Testimony in Her Summation.

The prosecutor capitalized on Dr. Crum's unconstitutional testimony during closing argument, highlighting his opinion about Billy's veracity and his claims that Billy exhibited the characteristics of an abused child. The prosecutor argued:

- Dr. Crum testified that it is not unusual for a child to disclose slowly. Thus, the additional and inconsistent accusations that were elicited from Billy during the years until the trial ***were characteristic of a sexually abused child***. (Tr. 484)

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[10]Again, there is no scientific basis for Dr. Crum's claims. Indeed, he offered none.

- If you go back and ***remember Dr. Crum's testimony, who is recognized by this Court as an expert,*** he told you that it is not uncharacteristic for a child to disclose slowly. He saw Billy on at least two occasions ...and that ***in his expert opinion Billy exhibited the characteristics of a sexually abused child.*** (Tr. 487)

- ***Now he didn't say that it was conclusive, but he said that the characteristics were those of a sexually abused child. And I asked him what the basis of his opinion was and he went back and he told you what it was that he recognized. He said that he talked to the family and found out about his sexually acting out***, and that was the inference to the cat's anus. (Tr. 487)

- ***Dr. Crum said, in his expert testimony, that this child showed signs of being sexually abused. We asked Dr. Crum and he said that this kid exhibited those signs of being sexually abused.*** (Tr. 517-518)

- [Dr. Crum] saw Billy on at least two occasions, I believe he specifically said three, and that ***in his expert opinion Billy exhibited the characteristics of a sexually abused child.*** ... (Tr. 487-488)

- Dr. Crum said, ***in his expert testimony, that this child showed signs of being sexually abused. We asked Dr. Crum and he said that this kid exhibited those signs of being sexually abused.*** (Tr. 517-518)

- ***Dr. Crum came in here and told you that this kind of acting out is consistent to somebody that has been sexually abused.*** (Tr. 521)

D. The Use of So Much Vouching Testimony to Convict Mr. Downey Violated His Constitutional Rights.

Dr. Crum's testimony violates the constitutional prohibition on vouching testimony as set out in cases from the Second, Eighth and Ninth circuits, *supra*.

He testified that he saw no evidence of the suggestion used by adults to elicit accusations from Billy *and* that his examination revealed no indication that Billy's claims were anything but true. This went well beyond the expert's claim in *Azure* that there was "no reason why" the accusation would not be true. Thus, Dr. Crum's testimony violated *Azure*.

Testifying that he tested Billy's "ability to understand the concepts of telling the truth versus telling a lie" (Tr. 296), and then supporting the claims of abuse, Dr. Crum violated *Binder*, *supra*, in which the circuit court condemned an expert claim that the complainant was "able to distinguish reality from fantasy and truth from falsehoods."*Binder*, 796 F.2d at 602.

In *Provist*, *supra*, the court condemned an "isolated statement" implying belief in an allegation. Dr. Crum's vouching pervaded his testimony and the prosecutor's summation. Hence, Dr. Crum's vouching violated *Provist*.

Dr. Crum violated *Scop*, *supra*, because his performance as a state witness was the kind of condemned "secondary opinion" based on his "assessment of the truthfulness [and] accuracy of" Billy, whose credibility was the sole issue here.

Dr. Crum's vouching testimony violated the Eleventh Circuit's opinion in *Snowden*, as it was nearly identical to the testimony there that resulted in the writ being issued.

E. Dr. Crum's Improper Testimony Was Material.

The Eleventh Circuit in *Snowden,* 135 F.3d 732 (11th Cir. 1998), *cert. den'd*, 119 S.Ct. 405 (1998), set out the test for determining when vouching testimony violates Due Process.

Even though the *Snowden* prosecution's expert never mentioned the complainant, the court held, "denial of fundamental fairness occurs whenever improper evidence 'is material in the sense of a crucial, critical, highly significant factor.' *Osborne v. Wainright*, 720 F.2d 1237 (11th Cir.1983)."

Determining that the improper vouching testimony in *Snowden* was material, the circuit court considered that it was one component of a prosecution including three child witnesses and medical evidence. *Snowden*, 135 F.3d at 738.

Dr. Crum's testimony was even more material here, where the other evidence was limited to a single child witness and his out of court statements.

Further, Mr. Downey's prosecutor used summation to highlight the expert vouching testimony, reminding the jury of all the improper, unreliable, and false claims he made.

Thus, Dr. Crum's unconstitutional vouching testimony was material.

F. This Claim was Exhausted in the State Courts.

In his direct appeal, Mr. Downey presented the violations caused by the state's expert vouching testimony. Pages 11-16 of his state court brief provide citations to Dr. Crum's improper testimony and to federal and state case law. Thus, state courts had a full and fair opportunity to reverse the conviction based on the issues presented in the federal courts.

G. The Claims Presented Herein Warrant Relief Under The Anti-Terrorism and Effective Death Penalty Act.

In *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998), the Eleventh Circuit established a three-step process for determining whether constitutional violations presented in a petition for habeas corpus satisfy AEDPA requirements: 1) survey the legal landscape to determine whether the petitioner's claims are based on legal principles clearly established by the Supreme Court "at the time the state court adjudicated petitioner's claim"; 2) determine whether the state court "face[d] a set of facts that is essentially the same as those the Supreme Court has faced earlier" but reached a different conclusion than the Supreme Court. If so, the state court decision is deemed "contrary to" existing federal precedent and relief is mandated; and 3) determine whether the state court decision was "unreasonable." A state court decision is unreasonable if it "is so incorrect that it would not be debatable among jurists."

Pursuant to the *Neelley* standard, habeas relief is required. The Eleventh Circuit in *Snowden* noted: "That such evidence [like Dr. Crum's in this case] is improper, in both state and federal trials, can hardly be disputed." Thus, the principle at the heart of Mr. Downey's petition -- that the state's vouching testimony violated Mr. Downey' s Due Process rights -- is clearly established.

Mr. Downey objected to Dr. Crum's improper testimony, alerting the trial court that Dr. Crum's testimony was nothing more than unsubstantiated and improper vouching. Thus, the state courts were faced with the same facts that had previously been recognized as unconstitutional by the circuit courts and – by denying certiorari – by this Court.

Finally, the state courts' decisions regarding the issues

presented there were unreasonable. The trial court -- even after citing Dr. Crum's penchant for finding abuse regardless of the circumstances – permitted Dr. Crum to vouch for the accusations. The post conviction courts denied Mr. Downey's petitions without opnion. Hence, there is no evidence that any state court even considered the claims presented.[11]

For these reasons, Mr. Downey's petition satisfies the *Neelley* requirements and requires that certiorari be granted.

CLAIM II

CERTIORARI MUST BE GRANTED BECAUSE MR. DOWNEY'S CONFRONTATION RIGHTS WERE VIOLATED WHEN THE TRIAL COURT PREVENTED FACE-TO-FACE CONFRONTATION

The trial court permitted the prosecution to rearrange the configuration of the courtroom to present Billy as a witness without having him face Mr. Downey. Because there was no finding that facing Mr. Downey would have caused Billy any harm, the deprivation of face-to-face confrontation violated Mr. Downey's Confrontation Clause right.

Contrary to the requirements of this Court in *Maryland v. Craig,* 497 U.S. 836, 110 S.Ct. 3157 (1990), the trial court never made a particularized finding that Billy would be traumatized by face-to-face confrontation. In fact, Billy told

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[11]Evidence of the unreasonableness of the state courts' decisions in this case is found in their disregard for Florida law. In *State v. Townsend*, 635 So.2d 942 (1994) and *Tingle v. Florida*, 536 So.2d 202 (1988), the state Supreme Court held that an expert cannot vouch for credibility. The state courts' refusal to grant relief on the same claims is unreasonable.

the court that it would not "be a problem or a pain" if he saw Mr. Downey while he was testifying. (Tr. 150-152, 12/22/92) The court even found that Billy would not be traumatized by face-to-face confrontation. (Tr. 4-6, 4/20/93) Nevertheless, at trial, the court permitted Billy to be escorted in through the back door of the courtroom and placed in the witness box, with the judge's bench fully blocking his view of Mr. Downey. Thus, there was no possibility of face-to-face contact between Mr. Downey and Billy as he testified.

Accordingly, Mr. Downey was deprived of his Sixth Amendment confrontation right and the jury was denied the opportunity to assess Billy's demeanor as he confronted Mr. Downey face-to-face during his testimony.

That this was a constitutional violation was clearly established by this Court at the time of trial. The state court faced facts essentially the same as this Court faced in *Craig, supra.* And, the state court's violation of Mr. Downey's right to confrontation was unreasonable, especially, because the court found that Billy would not be traumatized by facing him.

CLAIM III

CERTIORARI MUST BE GRANTED BECAUSE PROCEDURAL RULES DO NOT BAR REVIEW OF MR. DOWNEY'S PETITION FOR HABEAS CORPUS

Overview

In *Slack v. McDaniel*, _ U.S. _, 119 S.Ct. 1025 (2000), this Court held:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and

an appeal of the district court's order may be taken) if the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

The district court denied Mr. Downey's petition and motion to alter and amend, without a hearing, solely on procedural grounds. It denied a certificate of appealability within just three business days of filing. Thus, the court never considered the constitutional claims presented. Accordingly, the two-prong *Slack* analysis is required.

[1]. The Petition States a Valid Claim of the Denial of a Constitutional Right.

The facts and arguments presented above reveal that the conviction was caused by the same type of unconstitutional expert testimony condemned for constitutional reasons in *Snowden v. Singletary*, *supra*, and the cases from the other circuit courts cited. Accordingly, the merits of the petition state a valid claim of the denial of a constitutional right.

[2] Jurists of Reason Would Find it Debatable Whether the District Court Was Correct in its Procedural Ruling.

The time limit provisions of the AEDPA have proven to be remarkably confusing and have prompted extraordinary amounts of litigation from the enactment of the Act through the present. *e.g.*, *Lindh v. Murphy*, *supra* (7th Cir. 1996) through *Slack v. McDaniel*,119 S.Ct. 1025 (2000). Simply, the AEDPA left petitioners, and courts without a clear explanation of the way time limits might be applied.

It is now settled that the time limit provisions of the

AEDPA may not be used to deprive a petitioner from taking a reasonable time to file a federal habeas corpus petition. *e.g., Wilcox v. Singletary*, 158 F.3d 1209 (11th Cir. 1998); *Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997); *United States v. Simmonds*, 111 F.3d 737 (10th Cir. 1997); *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996).

Further, equitable tolling is also available to a petitioner whose filing is untimely. *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999)("court's judicious discretion equitably to toll helps safeguard habeas"); *Miller v. New Jersey State Dept. of Corr.*, 145 F.3d 616, (3rd Cir. 1998)(period of limitation is subject to equitable tolling); *Davis v. Johnson*, 158 F.3d 806 (5th Cir. 1998), *cert. den'd*, 119 S.Ct. 1474 (1999)(AEDPA one-year statute of limitations not a jurisdictional bar and can be equitably tolled); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.)(limitation period subject to equitable tolling), *cert. den'd*, 119 S.Ct. 210 (1998); *Calderon v. U.S. Dist. Ct for Central Cal.*, 128 F.3d 1283 (9th Cir. 1997)(time limit may be tolled); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)(equitable tolling available when petitioner is induced into missing filing deadline); *Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir.1988)(equitable tolling appropriate when petitioner was deceived by incorrect representation by an adversary, court or agency).

Here, Mr. Downey was deceived, in the midst of preparing his state post conviction relief petition, by the enactment of a confusing federal statute that changed the time limits for filing a state post conviction relief motion.

Immediately following his direct appeal, Mr. Downey retained Robert Pope, Esq. to file a state post conviction relief

motion. Mr. Pope had little federal litigation experience.[12]

When Mr. Pope was retained, there were no time limits governing the filing of a federal habeas petition and Florida's post conviction relief statute had a two year statute of limitations. Adhering to the state statute, Mr. Pope timely filed the state post conviction relief petition on April 15, 1997.[13]

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[12]An affidavit of Robert W. Pope was submitted to the district court. In it, attorney Pope states, in part:

> I relied on the guidance of the Florida law [3.850] as I allowed nearly the full two years to elapse between the final ruling on [Mr. Downey's] direct appeal and the filing of his post-conviction relief petition.
>
> As I was following the Florida post-conviction relief statute – including time limits – to the letter, it never occurred to me that a change in federal law could possibly curtail Mr. Downey's right to take all of the time allowed by the state to prepare and file his petition for post conviction relief....
>
> ... throughout my work on his case, Mr. Downey and his family encouraged me to file his petition. In fact, he and his family expressed their impatience on more than one occasion. Thus, it is no fault of Mr. Downey that his petition was not filed sooner.

[13]In *Edwards v. Carpenter*,_U.S._, 120 S.Ct. 1587 (2000), this Court held that a claim not properly presented in state court pursuant to state law is not preserved for federal review. "That is not a hard question," the Court wrote. The converse principle is as simple: a claim properly presented pursuant to state law is preserved for federal review.

During the two-year period for filing the state motion, the AEDPA was enacted, establishing a one-year limit from the termination of state court proceedings. It never occurred to attorney Pope that the time limits on the newly enacted federal statute would cut in half the time for filing a state post conviction relief motion. Mr. Pope was not alone in his ignorance. Petitioners and courts have grappled with AEDPA time limit issues from the date of its enactment.

Mr. Downey's state post conviction relief petition was decided on May 29, 1998 and he filed his petition for a Writ of Habeas Corpus in this Court on May 27, 1999 – less than one year from that date. Thus, he demonstrated his firm intent to follow all applicable procedural requirements.[14]

Given that the change in the law has left courts "grappling with the AEDPA and time bar limitation" (*Goodman v. U.S.* 151 F.3d 1335 (11th Cir. 1998)), it defies principles of equity to deprive Mr. Downey of the protections of the writ solely

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[14]Dismissing Mr. Downey's petition as time-barred, the district court suggested he was trying to exercise "unfettered discretion in deciding when to file a federal habeas petition." (Opinion p. 2) But Mr. Downey's state court litigation was limited to a single, timely, direct appeal and post-conviction relief motion. His habeas petition was filed within one year of those proceedings. The Conference Committee report on the AEDPA states: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. 104-518, 94th Cong. 2d Sess. 1111 (1996) Mr. Downey's conscientious conduct makes clear he is not the problem litigant the AEDPA was drafted to address.

because his attorney was unaware.[15] Thus, the circumstances of this case warrant equitable tolling of the AEDPA's time limit provision. Jurists of reason would debate the appropriateness of the district court's procedural dismissal.[16]

The facts and circumstances of this case demand that Mr. Downey's petition for habeas corpus be considered on its

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[15]Indeed, Attorneys General from states in every circuit believed, and argued, that the AEDPA time limits should be retroactively applied. The circuit courts and this Court rejected that argument. That so many states' highest ranking legal officials were confused – and wrong – about the application of the AEDPA time limits evidences their complexity. Fairness and Due Process demand that Mr. Downey not be forced to die in prison because of a latent effect of the AEDPA on the procedure for filing a state post conviction relief motion.

[16]The district court denied the motion to alter and amend relying entirely on *Sandvick, supra*, in which counsel waited until just days before the petition was due to file by mail. It arrived late and was dismissed as untimely. The error here was not so pedestrian. Here, counsel was fooled by a new, complicated law that had an unanticipated effect of cutting a state statute of limitations on which counsel had relied countless times. Thus, unlike *Sandvick,* counsel here was unable to interpret far-reaching effects of a new law that would be subject to interpretation for years after its enactment.

Also, the circumstances of this case are unique. Any lateness of Mr. Downey's filing was caused by the enactment of a new and confusing statute. Cases caught in the whirlpool of AEDPA interpretive litigation are limited. Indeed, this case may be the last. Thus, *Sandvick* does not support a refusal to consider the merits of Mr. Downey's petition.

merits. Any other result would represent a fundamental miscarriage of justice in which constitutional errors "probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) No procedural default can prevent relief in such a situation. *Schlup v. Delo*, 130 L.Ed.2d 808, 839 (1995).

CONCLUSION

As shown in his petition, briefs and pleadings before this Court and in the lower courts, Mr. Downey has made the requisite showing for the issuance of a writ of habeas corpus. He has also made the requisite showing for issuance of certificate of appealability.

For these reasons, Mr. Downey respectfully requests that this Court grant certiorari.

Respectfully submitted,

Robert Rosenthal
523 East 14th Street
Suite 8D
New York, New York 10009
(212) 353-3752

Dated: November 25, 2000

APPENDIX

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DOWNEY,

– against –

MICHAEL MOORE,
Secretary, Department of Corrections, State of Florida
Respondent,

and

The Attorney General of the State of Florida
Additional Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Decision of circuit court denying motion for certificate of appealability upon reconsideration (September 15, 2000) A3

Decision of circuit court denying motion for certificate of appealability (July 6, 2000) A4

District court order denying a certificate of appealability (April 20, 2000) A5

District court order denying motion to alter and amend (March 17, 2000) A7

District court order denying petition for writ of habeas corpus (June 8, 1999) A9

Police Officer Stempinsky Report (Excerpt) A13

Decision of circuit court denying motion for certificate of appealability upon reconsideration (September 15, 2000)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11967-J

GERALD DOWNEY,
Petitioner-Appellant,

versus

MICHAEL W. MOORE, Secretary,
Department of Corrections, State of Florida,
ROBERT BUTTERWORTH,
Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the
Middle District of Florida

Before TJOFLAT and BLACK, Circuit Judges.

BY THE COURT:

Upon reconsideration of this Court's order dated July 6, 2000, appellant's motion for a certificate of appealability is DENIED because appellant has not made the requisite showing. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 120 S.Ct. 1595, 1600-01 (2000).

Decision of circuit court denying motion for certificate of appealability (July 6, 2000)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11967-J

GERALD DOWNEY,

Petitioner-Appellant,

versus

MICHAEL W. MOORE, Secretary,
Department of Corrections, State of Florida,
ROBERT BUTTERWORTH,
Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Appellant's motion for a certificate of appealbility is DENIED for failure to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Joel F. Dubina
United States Circuit Court Judge

District court order denying a certificate of appealability (April 20, 2000)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GERALD DOWNEY,

Petitioner-Appellant,

versus Case No. 8:99-CV-1245-T-17B

MICHAEL W. MOORE,

Respondent.

Appeal from the United States District Court for the Middle District of Florida

ORDER

On June 6, 1999, this Court denied the petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 13, 2000, the petitioner filed a Notice of Appeal (Doc. 8), which this Court construes as a request for a certificate of appealability.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (the "Act") which contains amendments to 28 U.S.C. §§ 2244, 2253, 2254, 2255, Appellate Rule 22, and 21 U.S.C. § 848(q). As amended, 28 U.S.C. § 2253 provides that an appeal may not be taken from a district judge's ruling on a state prisoner's habeas corpus petition unless a "circuit justice or judge" issues a "certificate of appealability."

As amended, Rule 22 of the Federal Rules of Appellate Procedure reads, in part:

> (B) CERTIFICATE OF APPEALABILITY. – In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, or in a § 2255 proceeding, the applicant cannot take an appeal unless the district or a circuit court judge issues a certificate of appealability pursuant to section 2253 (c).

Therefore, while 28 U.S.C. § 2253 does not by its wording authorize district court judges to issue certificates of appealability, Rule 22 of the Federal Rules of Appellate Procedure grants district court judges that authority.

Pursuant to U.S.C. § 2253, a certificate of appealability should issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." The petitioner in this case has failed to meet the statutory test.

Accordingly, the petitioner's construed request for a certificate of appealability (Doc. 8) is DENIED.

ORDERED in Tampa, Florida, on April 20th 2000.

Elizabeth A. Kovachevich
United States District Court Judge

District court order denying motion to alter and amend (March 17, 2000)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GERALD DOWNEY,

Petitioner-Appellant,

versus Case No. 8:99-CV-1245-T-17B

MICHAEL W. MOORE,

Respondent.

Appeal from the United States District Court for the Middle District of Florida

ORDER

Before the Court is the petitioners motion to alter or amend judgment pursuant to Rule 59(e), Fed. R. Civ. P. (doc. 4). In his motion, the petitioner states that even though his petition for writ of habeas corpus was filed outside the one year limitations period, he is entitled to equitable tolling of the limitations period. The Court disagrees. The Eleventh Circuit holds that a petitioner is entitled to equitable tolling when extraordinary circumstances beyond the petitioner's control and unavoidable even with due diligence make it impossible to file the petition on time. *Sandvick v. United States,* 177 F.3d

1269 (11th Cir. 1999).* The Court finds that the petitioner has failed to meet the *Sandvick* standard. Accordingly, the petitioner's motion (Doc. 4) is DENIED.

ORDERED in Tampa, Florida, on March 17th, 2000

Elizabeth A. Kovachevich
United States District Court Judge

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*Even though *Sandvick* dealt with a motion to vacate by a federal prisoner pursuant to 28 U.S.C. § 2255 the same standard applies to habeas corpus petitions.

District court order denying petition for writ of habeas corpus (June 8, 1999)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GERALD DOWNEY,

Petitioner-Appellant,

versus Case No. 8:99-CV-1245-T-17B

MICHAEL W. MOORE,

Respondent.

Appeal from the United States District Court for the Middle District of Florida

ORDER

Before the Court is the petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus (Doc. 1). The petitioner challenges a conviction entered on September 9, 1993, by the Circuit Court for Pinellas County, Florida.

In his petition, the petitioner states that his conviction was affirmed on direct appeal to the Second District Court of Appeals on April 19, 1995. On April 15, 1997, the petitioner filed a motion for post conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, in the Pinellas County Circuit Court. The motion was denied on July 10, 1997. The petitioner filed a motion for rehearing. On August 22, 1997, the trial court denied the motion for rehearing. On September 9, 1997, the petitioner appealed the order denying

his Rule 3.850 motion to the Second District Court of Appeal. The order was affirmed on April 15, 1998. The petitioner filed a motion for rehearing that was denied on May 29, 1998.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Prior to AEDPA's enactment, state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition. Even delays of more than a decade did not necessarily bar a prisoner from seeking relief. E.g., Lonchar v. Thomas, 517 U.S. 314, 315 (1996).

The AEDPA dramatically shortened the time for filing a federal habeas petition to one year. Section 101 of AEDPA amended U.S.C. § 2244 by adding the following provision:

> (D)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subscription.

Section 101 does not start a prisoner's one-year limitation period running until "the date on which the judgment became final by conclusion of direct review." While the Supreme Court's denial of a certiorari petition does generally mark the end of direct review, the this date is not necessarily the date the judgment becomes final. In federal court, for example, a judgment does not become final following appeal until the case is returned to district court and the mandate is spread. See 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3987, at 687 n.2 (2d ed. 1996) ("Issuance of the appellate mandate returns the case to the district court."). Assuming that similar procedures prevail in the state courts. The date of final judgment may nor be the same as the date certiorari us denied. See Calderon v. United States District Court for the Central District of California, 112 F.3d 386, 389 (9th Cir. 1997).

Because the petitioner was convicted in 1993, his limitations period started to run on April 24, 1996, date of AEDPA's enactment. Wilcox v. Singletary, 158 F.3d 1209 (11th Cir. 1998). Three hundred fifty six days the petitioner's limitations period passed between AEDPA's enactment and the filing of the petitioner's Rule 3.850 motion on April 15, 1997. The petitioner's limitation period was tolled from April 15, 1997, to May 29, 1998, when the appellate court denied the motion for rehearing on the appeal of the petitioners Rule

3.850 motion. Three hundred sixty three days lapsed between the appellate's court denial of the motion for rehearing and the petitioner filing of this petition on May 27, 1999. Seven hundred nineteen days that counted towards the petitioner's limitations period lapsed between the AEDPA's enactment and the petitioner's filing of the petition, which clearly exceeded the one year limitations period. Accordingly, the petitioner's petition is time-barred.

An extension of time to file a habeas corpus petition is warranted only if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." Calderon v. United States Dist. Court, 128 F. 1283, 1288 (9th Cir. 1997). The petitioner has failed to show that an extraordinary circumstance beyond his control made it impossible for him to file his writ of habeas corpus in a timely manner. Accordingly, this action is DISMISSED as time-barred. The Clerk is instructed to enter judgment against the petitioner, to terminate all pending motions in this case, and to close the file.

ORDERED in Tampa, Florida, on June 8th, 1999.

Elizabeth A. Kovachevich
United States District Court Judge

Police Officer Stempinsky Report (Excerpt)

Writer was contacted by HRS case worker Laura Pitt regarding this incident, on HRS report number 91-070290. Apparently the mother was hesitant to report the incident, and a friend reported this incident to HRS.

The HRS case worker interviewed the child, and separately, writer interviewed the child. ....The child was difficult to interview due to his age.